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SOME PLAIN TALK TO VERBOSE LAWYERS.

That briefness and economy shall be a featural merit of Federal Court procedure, on the equity side, may now be spoken of as assured. There is no hope for relief on the law side until an obstinate Congress hears the impatient voice of a justly complaining people and sets the Supreme Court free. The latest official expression, guaranteeing this diagnosis, is by Mr. Justice McReynolds, in New York v. Consolidated Gas Company (April 15, 1922, 11 U. S. Sup. Crt. Ad. Op. 306), wherein he designated the violation of Equity Rules 75 and 76 as "indefensible practice which we shall hereafter feel at liberty to punish to the limit of our discretion—possibly by dismissal of the appeal." At about the same time Mr. Justice Clarke spoke unofficially to the same purpose, as will presently appear. If the timing of the two vital utterances were incidental, then the Bar has viewed a happy accident.

Mr. Justice McReynolds gave the reason for the rules as being "intended to protect the courts against useless, burdensome records, and litigants from unnecessary costs and delay." It does not require a retentive memory to recall that the chief complaint against the old equity rules was the costly imposition of lengthy depositions. The cost of printing often put an appeal out of the reach of the ordinary purse. This was a plain deprivation of justice. That rich corporate interests were using this anachronism to serve their ends, when pitted against a poor opponent, became a popular if not a political complaint and helped to fill the columns of both the daily newspapers and the magazines. Incidentally it helped to destroy faith in and created hostility to the courts. The incentive in this instance was wickedness—a determination to win, whatever the means to the end. Indeed, may it not be said of the practice, that it was both unethical and immoral. In this case it was suggested the litigant should bear the punishment.

But the other phase presents a different aspect. It is hidden from unprofessional eyes, for the rule is also "intended to protect the courts against useless, burdensome records." Let us follow this thought and apply it. The courts are behind in their business. New cases are piling up constantly and new business is being added. One feels impelled to say that it does seem that a lawyer—an officer of the court—would feel constrained if not obliged to aid the court by lessening the work required of the judge through short pleadings, briefs and records. It would seem that he would possess pride enough in contemporaneous judicial history to wish the judges to have time and opportunity to equal, if not to surpass, their great predecessors. This sentiment has merit whether emanating from a feeling of gentle sympathy, heroic patriotism or a simple sense of economy.

But it may be viewed from an angle of deprivation of another's right. Every page of that useless, burdensome record must be read by the conscientious judges at the sacrifice of attention to other cases. For these reasons the learned Justice might have added that the rules were intended as a protection to ethical litigants that they may not be deprived of their just meed of the time and thought of the court.

The serious breach puts one into a philosophical mood, rather than one of anger. Why does it happen? The incentive may be attributable to a lack of disposition to perform the necessary labor involved in the observance of Rules 75 and 76. It may be ignorance of the laws of evidence and of procedure. It may be a lack of familiarity with the law of the case. It may be a wicked disregard of all three. But, in any

event, the fault lies with the lawyer, and it is respectfully suggested that, in this phase of the question, he, and not the litigant, should be punished. That is the English way. The dismissal of the appeal punishes only the client. The guilty lawyer will hardly suffer in reputation, and will undergo no financial loss. It is doubtful if the client will ever know the real, unbiased truth. Lawyers are human and therefore find difficulty in conceding, if they see, their faults. It is through them that the report of the trial goes to the client.

It will be helpful to analyze the offense. Said the Court: "Without apparent attempt to comply with these rules, and with assent of appellant's counsel, appellants have filed a record of 21 volumes—20,000 printed pages—made up largely of stenographic reports of proceedings before the master, with hundreds of useless exhibits and many thousand pages of matter without present value." In no one of those particulars could a litigant have had a part except by suggestion, that obviously should have been controlled by the lawyer. But, a lawyer would have compounded the transgression by following the direction of a client to pad a record or to decline to make a proper synopsis of it on appeal.

Now, let us now consider some procedural "suggestions" pointed out by Mr. Justice Clarke in an unofficial capacity, that lose none of their force by appearing in an address, instead of an opinion. One would not go far afield in adopting these carefully framed "comments" as the views of the Supreme Court that cannot safely be ignored. Mr. Justice Clarke outlined to the New York University Law Alumni several inexcusable professional faults and pointed out some possible reasons.

The first is the yearning, inspired by an imaginary possibility of an increased reputation arising from an appearance in a case docketed in the Federal Supreme Court. Undoubtedly, it is a worthy ambition to be gratified in suitable cases. But, there is another and a very dark side. It is the probability that they will, instead, find themselves classified in a sort of a black list "in the concluding pages of each volume" as exhibiting a lack of both judgment and legal knowledge. "It would appear," said the speaker, "that some lawyers, in order to gratify this desire, resort to ingenuity and refinement of constitutional discussion rivalling the Middle Age school men in subtlety of distinction and futility of argument." The result is as pitiful as it is disastrous. The record shows one-fourth of the aspirants for the ear of the Supreme Court were censured with a *per curiam* opinion because, said Mr. Justice Clarke, "the questions presented were deemed so unsubstantial as to be unworthy of serious attention," or because "ruled by prior decisions."

Then again many lawyers "fail to open with a brief statement of the facts involved, the disposition below, and the principles of law relied upon." Let us have the disastrous results both to client and lawyer. Said Mr. Justice Clarke, "Such epitomized statement will, of course, be followed by a detailed statement and argument and citation of authorities, but without such an introduction it is often quite impossible even for the most attentive and able judge to appreciate the evidence and value of either discussion or authority." These elements point to the litigant's loss, but also to the personal suffering of the lawyer. "I may say," said the Justice, "that such a statement would have saved many a lawyer from those questions from the Bench which have sometimes proved so disconcerting to counsel and often disastrous to an otherwise sufficient argument." It does seem that this warning or reason will bear fruit, for the American lawyer is not willfully inclined, though somewhat lacking in the discipline that surely awaits him.

The next common lapse is a lack of brevity. In one case, declared the Justice, the briefs for the plaintiff in error contained 384 pages, and for the defendant in error,

1,064 pages. In another they were, respectively, 1,373 and 992. Added to these elephantine exhibitions of information for the court were filed a "Brief on the Facts" and still another bearing the dignified euhponism of "Brief on the Law." But accompanying these things and as a part and parcel thereof is a third dissertation entitled, "Topical Index to Briefs." After this deluge of wisdom there must be included the tender administration of an *Amicus Curiae*, of 424 pages!

No wonder, Mr. Justice Clarke felt inspired, incensed and inclined to sound a warning and to call for assistance by giving expression to the suffering of an overburdened mind and body, smothering beneath the mountain of chaff that suppressed the flame of the living law—the light that has guided the course of the greatest nation on earth from its infancy, for that is what the Supreme Court of the United States has done. No wonder that human limitations became articulate. A reasonable perfection of the dispensation of justice demanded it. And who would have done it more gently, whimsically and in altogether so effective a time and manner? What lawyer could take offense except from the promptings of a guilty conscience? And that would be a welcome symptom. Who is it that will not try to profit by the warning, except for the love of revenge? And that would be progress.

Altogether, Mr. Justice McReynold's opinion and Mr. Justice Clarke's address are two of the most fruitful lessons in advocacy that have come within the reach of the Bar. They ought to be permanently bound with Sir John Simon's address before the Canadian Bar in 1921 and generally distributed. That erudite and experienced Englishman spoke along the same lines. Every law school should cause both of them to become a compulsory portion of its course.

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

WHEN INTERSTATE CHARACTER OF SHIPMENT CEASES.—The case of Baltimore & O. S. W. R. Co., vs. Burtch, Ind., 134 N. E. 858, holds that the interstate character of a shipment ceases when the car is placed under control of the consignee for unloading. Accordingly, in an action for injury to a consignee called upon by the conductor of the train in accordance with the prevailing custom, to assist in unloading a heavy machine, it was not error to refuse an instruction that would have presented the case as one governed by the Federal Employers' Liability Act.

"In the case at hand the cutter had arrived at its destination, and, under rule 8—B, it was the duty of the consignee to unload it. The duty as fixed by this rule was equally obligatory on both appellant and the consignee of the shipment. As between them, as claimed by appellant, it was a law for their guidance In connection with this rule we are confronted with evidence undisputed that it was the universal custom of railroads to place the car containing a shipment, as in this case, at some convenient point for the consignee to unload and to notify him. Thus it may be said that an interstate shipment within rule 8—B is in interstate transit from loading to unloading points, and ceases to be such only when placed under consignee's control for unloading. When this is done, a railroad carrier has completed its last stage of service, and, as to such shipment, it is no longer engaged in interstate transportation. Hence any act by such carrier thereafter with reference to the unloading of such shipment, or by any of its employes or others called by it to assist in such act, would not be a furtherance of or an engaging in interstate transportation within the meaning of the federal act. Appellant, by its representative—the conductor—decided to and did actually enter upon the work of unloading the cutter while the car containing it was a part of the train standing on the side track, and work which, under the evidence, all must agree was that of another, had appellant performed its final act of transportation by placing the car in the hands of the consignee. This it did not do. Consequently appellant, in defending the instant action, found itself compelled to admit either that it was its duty to unload the cutter and that rule 8—B did not apply, or that rule 8—B did apply, and that by engaging in the work it not only violated the rule claimed by it to have the force of a general law, but a proven universal custom as well. It chose the latter position, thereby interposing its own wrong in opposition to a chosen remedy which, but for such wrong would be a proper one as the basis of an action instituted, not by the consignee, but by one who was induced to answer appellant's call for assistance in performing a work in violation of a rule it is now offering as a shield against responsibility for its negligence claimed to be the proximate cause of apellee's injury Appell-

ant's position in this respect ought not and cannot be approved. There was no error in refusing the instruction."

USE OF THE WATER IN NAVIGABLE STREAMS FOR COMMERCE AND POWER.*

Law controls whenever and wherever society functions under our dual system. Justice is the purpose of law and government, and lawyers are the ministers of justice and, therefore, must have special interest in all questions relating to law and government. It may be that often it is not a pecuniary or personal interest but still and at all times a larger interest—public welfare—which in our country, generally speaking, the lawyers have always recognized. It has been truly said that they have shared in the dignity of the founders of states, of restorers of states, of preservers of states, and are by profession statesmen.[1] And lawyers as such and as judges also must continue to expound and apply the law;[2] and as a correlative it is devolved upon them on proper occasions to condemn measures or practices not in harmony with our institutions or not conformable to the Constitution, the fundamental law. Related to this thought is the expression of Woodrow Wilson which cannot be too often repeated. "For the notable, I had almost said fundamental, circumstance of our political life is that our courts are, under our constitutional system, the means of our political development. Every change in our law, every modification of political practice, must sooner or later pass under their scrutiny. We can go only as fast as the legal habit of mind of our lawyers will permit. Our politics are bound up in the mental character and attitude and in the intellectual vigor and vision of our lawyers. Ours is so intensely and characteristically a legal polity that our politics depend upon our lawyers. They are the ultimate instruments of our life." It is also apposite to say that hardly any question arises in the United States which does not become sooner or later the subject of judicial scrutiny and debate. And it is the business of lawyers to participate in such debate to the end that the courts may ascertain and declare the law. When this is done whatever may be the law, it is the obvious duty of the lawyers to inculcate respect for the law because it is the law—rules prescribed by the supreme authority for the government of human action.[3] The fact that law is the rule of conduct, the guide, the method and the only assurance of public and private safety, in short that it is the mighty force of free government, does not preclude discussion of the wisdom or unwisdom of a law. This truth is too patent to be questioned, for indeed the people of the United States, more frequently and freely than any other peoples, denounce existing laws and demand modification or repeal. But even this does not militate against the general perseverance in the idea that eventually it makes for civic righteousness, for a better measure of justice and for the stability of orderly government if the people accept for the time being the existing law and abide by it as the controlling force. If change of law, organic or other, be desired there is always a lawful way to accomplish the change by invoking the public will according to the plan and methods of our representative government.

Assuming that these general observations are accepted as true, I am sure that the readers of this article, as members of the great profession and as publicists, will be interested in hearing some things about the law bearing on the utilization of the waters of the navigable streams of the United States.

*Revision of a recent address before the Mississippi State Bar Association by Hon. Henry D. Clayton, of Montgomery, Ala.

(1) Rufus Choate.

(2) "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch (5 U. S.) 137.

(3) State v. Hockett, 70 Iowa 442, 454.

It is worth while to know that according to the Geological Survey there is 53,905,000 potential water horse power in the United States and only 6,200,245 developed or utilized. Therefore, there is now being wasted 47,704,755 horse power. Doubtless this estimate of the potential power is too low. Let me give you one instance. The potential water power of Alabama is stated in the report referred to, to be 943,000 horse power, while it is now being claimed, in current history, that there can be developed at and near Muscle Shoals on the Tennessee River 1,000,000 horse power or more. But it is not my purpose to speak on the economic side of this question, for in that aspect the subject would have to be dealt with in a book and not in a short article.

Largely because most of the states took little or no interest in the subject of development and utilization of the water power in our country, Congress passed the Act of June 10, 1920, the purpose and scope of which is fairly stated, though in general terms, in the title, "An Act to create a Federal Power Commission, to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal Section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes."

This Act is the fruit of two independent bills introduced in the Congress more than five years ago. One of them, called the Navigable Water Bill, was designed for the construction of dams and reservoirs in navigable water for the double purpose of improving navigation and the harnessing of the surplus water in rocky and shoaly courses, where it was deemed best by Congress under the plan to improve the navigability by the slack water method; the other, called the Public Land Bill, had for its main purposes the devotion of flowing streams to power uses and for the impounding of water on the government domain or reservation for irrigation in furtherance of farm development.

The two bills had one element in common —the development of power. The first sought to confer jurisdiction or administration upon the Secretary of War; the other conferred like power on the Secretary of Interior and the Secretary of Agriculture. These measures never became laws because the Senate and House of Representatives could not agree upon the forms and all the provisions. Finally the two pieces of proposed legislation were in material respect combined into the one now called the Federal Water Power Act, before mentioned. This Act, among other things, created the Federal Power Commission, consisting of the Secretaries of War, Interior and Agriculture, and conferred upon this Commission the power of authorizing and regulating dams and reservoirs on navigable streams and the like improvements on public lands. It is apparent, of course, that these two subjects of legislation differ from each other, for the first relates to navigable streams and depends upon the power of Congress to regulate interstate and foreign commerce; and the other having reference to public land belonging to the Government, and predicated upon the power of Congress to dispose of the public lands and to make adequate rules and regulations with respect thereto. Both of these powers, in their respective scopes, have been recognized as plenary. They are, of course, limited as the exercise of legislative power in the first case to navigable waters and in the other to public lands. Under the Act here the licensees of the Commission are authorized to construct dams on navigable streams according to the congressional policy and plan. The combination of these two subjects into one act necessarily required that latitude should be given to the Power Commission in passing upon applications to erect dams and in determining whether in any case the application should be granted and upon what conditions, subject to what limitations and the like where the public welfare is concerned. It is manifest from specific pro-

visions of the Act that it is the duty of the Commission to safeguard the interest of the United States in navigation and commerce as well as the interests of the United States in the public lands. There are provisions designed to restrict the action of the Power Commission, some relating to commerce and others to public lands. For present purposes it is not necessary to amplify this statement.

The features of the Act which relate to water power on the public or government lands will not be particularly dealt with at this time, but the important provisions having to do with navigable streams specially in the states will more closely be considered. But, of course, limited space will not permit a review of all the details of the necessarily lengthy Act.

In a case where a licensee of the Power Commission sought to condemn the lands of riparian owners on the Coosa River in Alabama the constitutionality of the Act was challenged on the grounds that it trespasses upon the power of the States to control and regulate or use their own navigable waters, which power so claimed on the part of the State was admitted to be subordinate to the commerce power of Congress to intervene for the protection and improvement of navigation; [4] and also that it is a delegation of legislative functions to the Power Commission rather than merely the bestowal of administrative duties. Stated otherwise, it was said to be an attempt on the part of Congress to invade the right of the State and to take away from the State the control and regulation of the hydro-electric development; that it infringes upon the authority of the State in the matter of the transmission and distribution within the State of electric energy generated therein; and further, that the effect of legislation is to put the Government of the United States into the business not only of generating but of transmitting and distributing, intrastate and interstate, power originating at the dams constructed under the government license, which generation, transmission and distribution is aside from or beyond any governmental purpose but is for the benefit of private corporations or persons licensed to construct the dams on navigable streams.

Perhaps it is not too much to say that the questions raised can be determined by cardinal rules governing constitutional constructions. For present purposes these rules may be summarized as follows:

In considering its validity the presumption is that the statute is constitutional.[5] And the rule following this presumption, which has always been adhered to, was stated by Chief Justice Marshall to be, "Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."[6]

The use of property including lands, of course, when necessary for the purpose of improving the navigation on navigable streams is such public use that authorizes the property to be taken by condemnation under the power of eminent domain of the United States, and the right to exercise this power is limited only by the requirement of the Constitution that just compensation shall be afforded the owner.[7] And the United States may sequester land for a Federal purpose without the consent of the State.[8]

The rule is usually stated to be that where property is sought to be taken or condemned for a public use whether such

(4) Gilman v. Phila., 3 Wall, 713, 725; Mobile v. Kimball, 102 U. S. 699; Wisconsin v. Duluth, 96 U. S. 379.

(5) U. S. v. Gettysburg E. Ry., 160 U. S. 680; Sweet v. Rechel, 159 U. S. 380; Nichol v. Ames, 173 U. S. 509.

(6) McCulloch v. Maryland, 4 Wheat., 159.

(7) Kaukauna W. P. Co. v. Green Bay, etc., Canal., 142 U. S. 254; Monongahela N. Co. v. U. S., 148 U. S. 312; U. S. v. Chandler-Dunbar W. P. Co., 229 U. S. 53.

(8) Kohl v. U. S., 91 U. S. 367. For eminent domain is the inherent power of the United States as a sovereign to take or to authorize the taking of property within its jurisdiction for the Federal public use.

property is necessary to that end is a legislative question and the detemination thereof by the authorized legislative body cannot be questioned in a proceeding to take or condemn the property,[9] and that a hearing on the question of necessity is not essential to due process of law demanded by the 14th Amendment.[10] The general rule is modified to the extent that when the legislature has declared the use or purpose to be a public one its judgment will be respected by the courts unless the use be palpably without reasonable foundation.[11] But while the legislature has the authority to declare when a necessity exists for the exercise of the power of eminent domain, yet the use of any particular property for such public purpose may in the end be a question for the courts.[12] And the United States can not take property unless necessary for the uses of the United States.[13] Furthermore, where the property is taken for a public use the fact that it will result in greater benefit to some persons than to others or that private individuals contributed to the expense of such undertaking does not affect the constitutional character of such use or render it any less of a public nature within the scope and meaning of the law of eminent domain.[14]

The power to determine the question of necessity for public use may be delegated by Congress to executive officials and their findings on this question in the exercise of such delegated power is not subject to review by the courts;[15] except as stated in the Gettysburg case.[16]

(9) Shoemaker v. U. S., 147 U. S. 282; Monongahela Nav. Co. v. U. S., 148 U. S. 312; U. S. v. Gettysburg E. Ry. Co., 160 U. S. 668.

(10) Bragg v. Weaver, 251 U. S. 57.

(11) Justice Peckham in U. S. v. Gettysburg, etc., Co., 160 U. S. 680.

(12) Henderson v. City of Lexington (Ky.), 111 S. W. 318, 22 L. R. A. (N. S.) 1; Shoemaker v. U. S., 147 U. S. 282; Fallbrook I. Dist. v. Bradley, 164 U. S. 112; Hairston v. D. & W. Ry. Co., 208 U. S. 598; Sears v. Akron, 246 U. S. 242.

(13) Stockton v. Baltimore, etc., R. R. Co., 32 Fed. 9.

(14) Fallbrook I. Dist. v. Bradley, 164 U. S. 112; Union Lime Co. v. C. & N. W. Ry. Co., 233 U. S. 211.

(15) Chappell v. U. S., 160 U. S. 499; Union Bridge Co. v. U. S., 204 U. S. 364; Forbes v. U. S., 268 Fed. 273; Forbes v. U. S., 259 Fed. 585.

(16) U. S. v. Gettysburg, etc., Co., 160 U. S. 680.

The fact that the expenses incident to the condemnation and the resultant compensation award are paid by private person or corporation is consistent with the Constitution, is not a delegation of the power of eminent domain to private parties, the property being thus acquired by the Government and it being immaterial and of no concern to the owners what arrangement the Government may have with others for the payment of the compensation.[17]

Of course the lawyer and the intelligent layman understand, in a general way, the demarkation between the powers granted to the Federal government and those reserved to the States; and the text books abound in utterances touching the subject. From the very beginning, however, and in instances too numerous to mention, the debate has been in concrete cases over the question where the power of the State ends and that of the Federal government begins. This is to say that it is easy to state in a general and abstract way the difference between the two powers, but that the application of the governing doctrines and principles have been it is not too much to say, the occasion for the profound study and the subject of earnest debate on the part of statesmen and at the same time the courts as a rule have been called upon to give grave consideration to and to determine the application of these doctrines and principles. This subject has been dealt with in many treatises on the development of the American Constitutional Law. Doubtless such debates will continue and such consideration by the courts will be had from time to time as long as our Government shall endure in its present form and with its existing dual system. It is our hope and belief, we may say here, that our Government with its representative characteristics will last forever, for it is the best experiment ever practiced anywhere at any time.

Our system has been solemnly declared to be an indissoluble union of indestructible

(17) In re Condemnation, etc., of Rouge River, 266 Fed. 105, 115.

states. And yet, as I have said in other words, this fine doctrine and sentiment has and will continue to be the subject of acrimonious debate in our politics and for responsible study and determination by the courts whenever and wherever there is conflict or apparent conflict between the authority of the United States and a State or States. It is true that at the time the States formed themselves into a more perfect union under the Constitution they held the right to their navigable waters, and the beds under them, with the right to use or dispose thereof without substantial impairment of the interest of the public in such waters; and it is accepted that absolute property in and dominion over navigable streams, tidewaters, and the underlying soils were not granted to the general government but were reserved to and now remain in the States or under State sovereignty. [18] It is also familiar that the State's ownership of or sovereignty over navigable waters is subordinate to the control of Congress over commerce and navigation. Whatever right the State has to use or dispose of navigable waters, for instance, to bridge, obstruct, divert or improve and the like, is not superior to the power of Congress to regulate foreign and interstate commerce, including navigation, and to protect and improve the navigability of navigable streams and other waters.[19] It is also a settled doctrine that the power of Congress over navigable streams is limited to the protection and improvement of them in the interests of commerce, that is to say navigation. The municipal power of the states over their streams, underlying and adjacent lands, is subordinate to the right of eminent domain of the United States to take such lands for Federal constitutnonal purposes. It must be conceded that the Federal government can take property necessary for the improvement of the navigability or navigable streams and when it does take property for such purpose—primary or dominant—then what use or disposition can the Federal government rightfully, that is to say in harmony with a fair interpretation of the constitutional grant, make of the surplus water wasted at the dam constructed to improve navigation by the slack water method? This question I shall hereafter undertake to answer.

(18) Martin v. Waddell, 16 Pet. 367; Manchester v. Mass., 139 U. S. 240.

(19) Gibbons v. Ogden, 9 Wheat. 1, 194; Stone v. Southern Ill. Bridge Co., 206 U. S. 267.

Now let me apply the foregoing doctrines and principles to the Federal Power Commission Act, the title of which has been stated.

Section 3 defines the term "navigable waters" for it says

"'Navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States, or shall have been recommended to Congress for such improvement after investigation under its authority."

This expression is in harmony with what the Supreme Court has often held the term "navigable stream" to mean; and doubtless it will be admitted that this definition shows that Congress meant to and was exercising its incontestable power over navigable waters of navigable streams.

Farther on the Act says—

"'Project' means complete unit of improvement or development, consisting of power house, all water conduits, all dams and appurtenant works and structures, including navigation structures, which are a part of said unit,"

showing again that Congress was dealing with navigation or what pertains to it in a detail aspect.

By Section 4 the Commission is empowered, "to make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water power industry and its relation to other industries, and to interstate or foreign commerce",

and this evidences an additional intention of Congress to make better use of the water for commerce as well as to develop power and that in the promotion of both projects the data is desired. And then under paragraph (d) the Commission is authorized

"to issue licenses to citizens of the United States, or to any association of such citizen, or to any corporation organized under the laws of the United States or any State there of, or municipality * * * for the development and improvement of navigation, and for the development, transmission and utilization of power across, along, from or in any of the navigable streams of the United States."

(The language that does not refer to navigation is omitted.)

The enactment proceeds

"Provided further that no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War."

And here it may be said that this is the delegation of a mere administrative detail and cannot be the delegation of legislative power. So the following language of the Act may be likewise characterized.

"Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission."

In providing for the improvement of the navigability of a stream this power has been conferred just as it has been customary, as illustrated by numerous statutes which have been upheld; that is to say statutes delegating to an agent or agents whose judgment will determine the necessity for or the expediency of the selection of the particular place or the ascertainment of like essential facts. This has been the legislative practice in providing for the detailed execution of the congressional or Federal policy where the Secretary of War, for instance, or some other official of the government has been named to act in the matter of carrying out the statute.[20]

Section 6 is that—

"Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act, and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license."

Thus the matter of license to construct the dam becomes in its nature the contract between the licensee and the government for making the improvement, and when accepted the licensee is bound to comply with its conditions or submit to forfeiture of license.

Section 10 goes more into detail, for it provides—

"That all licenses issued under this Act shall be on the following conditions:

That the project adopted, including the maps, plans and specifications shall be such as in the judgment of the Commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses; and if necessary in order to secure such scheme—

that is, a scheme in the interest of navigation, which is the paramount consideration—

"the Commission shall have the authority to require the modification of any project—

And "project" includes navigation structures—

"and of the plans and specifications of the project works before approval."

Further,

(20) O. S. Nav. Co. v. Strannahan, 214 U. S. 320; Brushaber v. U. P. R. R. Co., 240 U. S. 1, 26; Field v. Clark, 140 U. S. 649; Buttfield v. Strannahan, 192 U. S. 470; U. S. v. Grimaud, 220 U. S. 506.

"(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacement, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health and property."

Section 11 stipulates:

"That if the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the Commission—

will require certain thing, ot which the ones with reference to navigation follow. The Act states

"That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of War and made part of such license."

In other words, as a fundamental requirement of the acceptance of the license, the licensee is bound to do these things in reference to navigation. Further, it is required

"(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights of way * * * through is dams, and permit such control of pools as may be required to complete such navigation facilities."

"(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States."

It would seem that Section 11 is sufficient to show that the paramount object of the Act is the promotion of navigation.

Thus has been covered in a general way the provisions relating to navigation until we get to one of vital importance here, that is Section 21. That confers upon the agency of the United States, selected under the legislative authority, which agency is the licensee, the power and duty to act in reference to the navigation project both in its construction and in its maintenance.

Now it is clear that the Government has the right to condemn private property for public use and the private right or use for or benefit is immaterial so far as the validity of the Act is concerned. It is settled that Congress can delegate the right of eminent domain to a Federal agency selected pursuant to the congressional authority, an agency for carrying out its policy and principles in an administrative way in the development or improvement of navigaton. Of course, in the other phase of the Act, dealing with waters on government reservations, public lands, the right of eminent domain of the United States is, I think, for all practical purposes not so very limited.[21]

Section 21 provides

"That when any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which, in the judgment of the Commission, is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interestate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the District Court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the District Court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the court of the State where the property is situated: Provided, that United States District Courts shall only have jurisdiction

(21) U. S. v. Winans, 198 U. S. 383; Mormon Church v. U. S., 136 U. S. 42.

of cases where the amount claimed by the owner of the property to be condemned exceeds $3,000."

You will note that the Act giving the right of eminent domain for navigation purposes copies word for word the previous language of the Act which conferred upon the Federal Power Commission the administrative authority as agency to determine when the improvement, in the judgment of the Commission, is desirable and justified in the public interest, for the purpose of promoting commerce or improving the waterway.

Here are the more explicit provisions contained in the license. Article 9 of the license is that

"Operation of the navigation facilities and the discharging of water from the dam and the control of the level of the reservoir created by the dam, are subject to such reasonable rules and regulations in the interest of navigation as may be made from time to time by the Secretary of War."

In further regard to the scope of the Act, the national policy expressed in it is that the United States may at the expiration of fifty years take over any water project constructed under the Act and that if the United States does not at the end of such period take over the project the State or municipality under Section 7 is given the preferential right over the original lessee to a renewal of the license. Thus the United States or the State may take over the project as stated. During the fifty year term the right is also reserved to the United States or the State or municipality to take it over at any time by the condemnation proceedings on the payment of just compensation. These provisions and the Act itself are in line with a veto message of President Taft, who said

"I deem it highly important that the nation should adopt a consistent and harmonious policy of treatment of these water power projects which will preserve for this purpose their value to the Government whose right it is to grant the permit. The necessity for the adoption of such a policy has recently been pointed out, with my approval by the Secretary of War, and I see no reason why this bill should be exempted from the safeguards which have been recommended by him in the cases of other bills now pending before Congress."

Sections 19 and 27 of the Act evidence the intention of Congress while asserting the Federal power to carefully respect the reserved power of the States. These two sections are manifestly the result of a compromise on the part of those Senators and Representatives who held the broadest view of congressional power over the subject and those of their associates most pronounced in desiring to safeguard the rights of the States. But nevertheless the purposes are the improvement and use of navigable stream for commerce and, incidentally, the subservient use of the superabundant water at the dams for generating power, and in the same connection the intention was to negative the charge of Federal usurpation and to distinctly recognize the rights of the State in navigable streams; for Section 19 takes cognizance of the rights of the States to regulate the services to be rendered by public utilities to consumers of power and the rates and charges therefor. Its language is

"That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the service to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount

or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: Provided, that the jurisdiction of the Commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter."

And Section 27 stipulates

"That nothing herein contained shall be construed as affecting or intending to affect or in any way interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Of course the application of the doctrine *ejusdem generis* will reconcile this section with the other provisions of the Act so that under the principles before stated the enactment will stand as a lawful measure for the improvement of navigation.

I think the case of U. S. v. Chandler-Dunbar Co., 229 U. S., 53, is in point and that the doctrine there announced sustains the constitutionality of the Federal Water Power Act. It will be remembered that there the Act of March 3, 1909 (35 Stat., 815, 820) was under review and that it authorized the Secretary of War to lease upon agreed terms any excess of water which resulted from the conservation of the flow of the river and the works which the Government constructed. It was claimed in one aspect of the Federal Water Power Act that the Act of 1909 was the taking of private property for commercial uses and not for navigation. But Justice Lurton, who delivered the unanimous opinion of the Court, said

"But aside from the exclusive public purpose declared by the eleventh section of the act, the twelfth section declares that the conservation of the flow of the river is 'primarily for the benefit of navigation, and incidentally for the purpose of having the water power developed, either for the direct use of the United States, or by lease * * * through the Secretary of War.' If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by state governments. In Kaukauna Co. v. Green Bay &c. Canal, 142 U. S. 254, 273, respecting a Wisconsin Act to which this objection was made, the Court said:

'But, if, in erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw—controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.'"

The right of the United States to the use of the surplus water was recognized in the case where the United States had purchased the improvement on the Fox and Wisconsin Rivers and permitted the grantor to reserve from the conveyance all personal property and the water power created at the dam by the use of the surplus waters not needed for the purpose of navigation, had completed and maintained the improvement at a large expense; and it was held that the reservation of the use or disposition of the surplus waters accumulated by the dams built be-

(22) Green Bay & M. C. Co. v. Patton, 172 U. S. 58.

came vested in the United States when it acquired the improvement and that the subsequent purchaser from the United States of the water power became the sole owner of the same subject only to the control and regulation of its use by the United States.[22]

To consider all provisions of the Act relating to administrative detail or to elaborate the argument advanced or to read from all the authorities supporting the principles involved would not consist with the occasion or be deferential to you whose courtesy is enjoyed.

It must be concluded that in passing the Federal Water Power Act, providing for navigation and the servient use of excessive water, Congress did not transcend the constitutional grant of power. It may be that if the Act created a power commission for the sole purpose of damming up navigable streams in order to generate and sell water power the Act would be in excess of the Constitution. But the purpose as shown by Section 18, as well as that in the other sections mentioned, is that the operation of any navigation facilities as a part of or related to any dam or structure built under the Act shall be controlled by rules and regulations made by the Secretary of War in the interests of navigation, including the control of the level of the pool created by such dam or structure Thus we see that this is a further negation of the idea that Congress intended to put the Federal government into the business of generating and selling water power. And it may be said that this Section 18 gives additional emphasis to the fact that the purpose of Congress was to improve the navigation and to conserve the necessary water to that end.

Comment need not be made on the far-reaching effect of the Federal policy and this law carrying the purpose of the subservient use of water which is in excess of that necessary for navigation in navigable streams. That is suggested as a subject for your intelligent, thoughtful consideration.

HENRY D. CLAYTON.

Montgomery.

WORKMEN'S COMPENSATION ACT—ASSAULT.

SCHOLTZHAUER v. C. & L. LUNCH CO.

134 N. E. 701.

Court of Appeals of New York, Feb. 28, 1922.

Where a waitress, engaged in her work, was shot and killed by a co-employe, a negro, because she had declined an invitation to go out with him, the murder, while it arose during the "course of the employment," did not arise out of it, but because of her refusal to accept the negro's invitation and his anger by reason thereof, and did not justify an award of compensation under the Workmen's Compensation Law, since an award cannot be made where the accident results from the chances of life in general, to which the injured person was exposed in common with all mankind, rather than as an employe.

Charles B. Sullivan, of Albany, and Alfred W. Andrews, of New York City, for appellants.

Charles D. Newton, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondents.

McLAUGHLIN, J. On the 28th of June, 1919, Irma D. Scholtzhauer, daughter of the claimant, was employed as a waitress by the C. & L. Lunch Company, at 2246 Broadway, New York City. There was employed at the same time, by the same company, a colored dishwasher by the name of Arthurs. About 6 o'clock in the afternoon of the day named Arthurs invited the daughter to go out with him that evening. She declined the invitation and stated to another employe that she would not go out with a negro. Her statement to this effect having been repeated to Arthurs, made him very angry. Shortly thereafter, when the daughter took some dishes to the place where Arthurs was working and pushed them through an opening in the partition between the restaurant and the kitchen, he drew a pistol and shot her, and immediately ran from the kitchen to the restaurant, again shot her, and she died shortly thereafter. Claims for compensation were filed by the mother and two sisters of the deceased, on the ground that they were dependents. The claims of the sisters were not allowed, but that of the mother was. An appeal was taken by the employer and the insurance carrier to the Appellate Division, Third Department, where the determination of the Industrial Board was unanimously affirmed. Permission was thereafter given to appeal to this Court.

To justify the State Industrial Board in making an award, the injury complained of must have arisen both out of and in the course of

the employment. It must have been received while the employe was doing the work for which he was employed, and in addition thereto such injury must be a natural incident to the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work. Heitz v. Ruppert, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344. An award cannot be made where the accident results from the chances of life in general to which the injured person was exposed in common with all mankind rather than as an employe. Heitz v. Ruppert, supra, 218 N. Y. 152, 112 N. E. 750, L. R. A. 1917A, 344; Craske v. Wigan (1909), L. R. 2 K. B. 635; Thom v. Sinclair (1917), App. Cas. 137; Dennis v. White Co. (1917), App. Cas. 479; Rayner v. Sligh Furniture Co., 180 Mich. 168, 146 N. W. 665, L. R. A. 1916A, 22, Ann. Cas. 1916A, 386.

The authorities cited by the respondent are not in point. The injury in such cases all arose over some dispute as to the work to be done by the employe or in some other way were directly traceable to and connected with the employment. Here the injury to the daughter, while it arose during the course of, did not arise out of, the employment. The only suggestion that the employment had any bearing on the injury was that the employment brought the two persons together. The murder, however, arose not out of the employment, but because the deceased refused to accept Arthurs' invitation, and his anger by reason thereof. The fact that the murder took place on the employer's premises was a mere incident. It might equally well have happened on the sidewalk in front of the building, or while the daughter was on her way home, or at any other place where Arthurs had chanced to meet her. Had Arthurs made the proposal to the daughter while she was away from the place of employment, and after her rejection of it had killed her, it could not with any reason be contended that a claim could arise under the Compensation Law (Consol. Laws, c. 67).

The order of the Appellate Division and the determination of the Industrial Board are therefore reversed, and the claim dismissed, with costs against the Industrial Board in this court and the Appellate Division.

Order reversed, etc.

NOTE—*Injuries from Assault Arising in Controversy not Connected with Employment as Compensable.*—The test to be applied to determine whether or not an injury is compensable which is due to an assault made upon the employe is whether the attack grew out of the employment or was one of personal vengeance. The foreman of a composing room, who had the right to give orders pertaining to the janitor work of that room, and, if the orders were not obeyed to report such violation to the employer, was shot by a negro janitor. On the day before the shooting the foreman had reported the janitor for refusal to obey orders. The janitor testified that the foreman did not want him to work there, and that the man in control of the janitor work had told the foreman to leave this janitor alone, and that he shot the foreman because the foreman tried to shoot him. Compensation was denied. Marshall v. Banker-Vawter Co., 206 Mich. 466, 173 N. W. 191, 18 N. C. C. A. 1051.

Where a chauffeur was directed to drive a passenger to a railway station, and arriving at the station and finding that the train was late, he proceeded to drive to another point for his own and his passenger's convenience, and while so doing was shot by the passenger, who suddenly became insane, the Court held that the accident did not arise out of the employment, for the employe left the employment for purposes of his own. Central Garage v. Ind. Commission, 286 Ills. 291, 121 N. E. 587.

An abattoir worker, resenting an assault by a coemploye, who threw a piece of flesh at him, used the flesh in striking another employe, whom he erroneously believed to be the assailant. The latter in turn kicked the claimant. It was held that the injuries sustained by the claimant arose out of the employment. In this case the Court in part said:

"I may seem harsh and arbitrary to impose liability upon a master for an assault committed by a workman upon a co-workman, but the purpose and intent of the statute is to fix an arbitrary liability in the greater public interest involved. This legislation was to ameliorate a social condition—not to define a situation or fix a liability by an adherence to the old common law. Liability was imposed regardless of fault—vitally different from that under the common law. Injury by an employe moved by some cause aside from his regular duties, may be considered an inevitable, however undesirable, result—a risk which is incident to the employment of many persons. It is a burden which industry may well bear under this legislation." Verschlerser v. Joseph Stern & Son, N. Y. App. Div., 128 N. E. 126, 6 W. C. L. J. 472.

The superintendent of an apartment house was injured by an assault committed upon him by a tenant of the building as the result of a quarrel arising from insults offered the tenant's wife. The Court held that the accident did not arise out of the employment, assaults being accidents arising out of the employment only when the employe is engaged in the master's business. Muller v. H. & A. Cohen, Inc., 186 App. Div. 845, 174 N. Y. Supp. 736, 3 W. C. L. J. 649.

In a case in which it appeared that a negro killed a fellow employe, who refused to bring the negro a drink when getting one for himself, it was held that death was not due to an accident having its origin in a risk of the employment. Chicago v. Ind. Commission, Ills., 127 N. E. 49, 6 W. C. L. J. 17.

WEEKLY DIGEST.

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1. **Automobiles**—Negligence.—Negligence of servant driving automobile is imputable to employers riding as passengers.—Cole v. Washington Water Power Co., Wash., 204 Pac. 1060.

2.——Willful Injury.—Under C. S. § 768, providing that no woman shall be arrested, except for willful injury to a person, in an action for injury from being struck by an automobile, where the evidence showed that defendant was in open violation of the laws as to running of automobiles, and her conduct was without regard for the lives and safety of others, the issue as to whether her acts were willful was for the jury.—Weathers v. Baldwin, N. C., 111 S. E. 183.

3. **Bankruptcy**—Enforcement of Obligations.—Under Bankruptcy Law, § 11, the power to stay obligations of bankrupts relates only to dischargeable debts, and the enforcement of obligations not dischargeable will not be stayed.—In re Stone, U. S. D. C., 278 Fed. 566.

4.——License Contract.—A so-called license contract, under which petitioner delivered to bankrupt certain patented ovens and other unpatented bakery tools and equipment, for a consideration equal to their full value, with the right to use petitioner's trade-mark on its products and certain secret formulas, on payment of a royalty on its sales, which contract reserved title in petitioner to all the property, with the right to retake the same on breach of conditions, held valid in such reservation as to the patented ovens, and the right to use the trade-mark, but invalid to give a lien on any of the unpatented articles, as against bankrupt's creditors, not being recorded as required by the laws of the state.—In re Federal System of Bakeries of Maryland, U. S. D. C., 278 Fed. 523.

5.——Lien.—A landlord, who had a lien on a part of bankrupt's property, which he waived by agreement with the trustee to allow the property to be sold as a whole, held entitled to prove that the value of the property subject to his lien exceeded his claim, in support of his claim to priority of payment from the proceeds of the sale, and the inventory and appraisement of the trustee and the bid of a third party for such property, when offered separately, held competent evidence.—Frederick v. Meyran, U. S. C. C. A., 278 Fed. 503.

6.——Set-off.—A provable claim of a bank against a bankrupt estate, and a claim of the trustee in bankruptcy for funds of the estate deposited in the bank as an authorized depository of the court, held not "mutual debts," which may be made the subject of set-off by either party under Bankruptcy Act, § 68a.—In re O'Gara Coal Co., U. S. C. C. A., 278 Fed. 509.

7. **Banks and Banking**—Debt to Bank.—A bank to which a person is indebted has a right to apply any fund belonging to the debtor in its possession to its debt.—Beatty-Folsom Co. v. Edwards, Tex., 238 S. W. 340.

8.——Loan.—Under Laws 1917, p. 297, § 52, an officer of a bank cannot make a loan to himself, and a loan to him cannot be consummated without the resolution required by the statute being first entered in the corporate minutes, and an offense cannot be wiped out by a subsequent approval.—State v. Larson, Wash., 204 Pac. 1041.

9.——Negligence.—The sending of envelope containing bonds through the mail without registration of envelope by employees of bank having possession of bonds of depositor for the purpose of sale held negligence.—Citizens' Nat. Bank of Jasper v. Ratcliff & Lanier, Tex., 238 S. W. 362.

10.——Negligence.—Defendant bank, agent for plaintiff in the remittance of interest on June 1, 1916, wrote plaintiff, in Germany, that they were unable to make her interest remittance by draft and, without waiting for directions asked, made remittance by checks for marks, which were held back by Great Britain till 1919, when the checks were dishonored. In an action for the amount of the checks in American money, held, that defendant was guilty of negligence, and that plaintiff's recovery should not be limited to her rights on the checks, the value of which was almost nil at time of suit.—Barney v. Bond & Mortgage Guarantee Co., N. Y., 193 N. Y. S. 19.

11.——"Wireless Transfer."—On the seller of a "wireless transfer" rests the duty to effect cancellation and return within a reasonable time after he learns it cannot be delivered, but the conditions of the World War and conditions following it afforded excuse for the seller's failure to effect return and cancellation of a credit purchased in February, 1917; the seller's

first knowledge of non-delivery being August 13, 1920.—Plischner v. Taylor, N. Y., 192 N. Y. S. 236.

12. **Bills and Notes**—Consideration.—Knowledge of the consideration of a note is not notice that the consideration has failed, if it has failed; and one who buys the note bona fide for value and before maturity is not bound to make inquiry whether there is a failure of consideration. Citizens' Bank of Vidalia v. Greene, 12 Ga. App. 49(3), 76 S. E. 795.—Aprea v. Oglethorpe Savings & Trust Co., Ga., 111 S. E. 215.

13. **Carriers of Goods**—Demurrage.—Where, because of unprecedented flood conditions, cars of logs could not be delivered at the usual unloading place on a spur track next to the boom connected with consignee's mill plant, but were left at a distance outside consignee's mill premises, there was no delivery, and therefore there could be no demurrage.—Oregon-Washington R. & Nav. Co. v. McGoldbrick L. Co., Wash., 204 Pac. 1059.

14.——Negligence.—In view of Personal Property Law, § 101, subd. 2, providing that, where title to goods shipped is by the bill of lading retained by the seller, his property therein shall be deemed only for the purpose of securing performance by the buyer, where a shipment of potatoes, accompanied by a bill of lading running to the seller with draft attached, was injured in transit, the carrier was liable to the buyer for damages resulting from negligence.—Kleinhans v. Canadian Pac. Ry. Co., N. Y., 193 N. Y. S. 25.

15. **Carriers of Live Stock**—Notice of Loss.—A shipper is not barred from maintaining a suit against the carrier to recover for a loss to an interstate shipment of live stock occasioned by the carrier's negligence, because he did not file his claim with the carrier within four months, as provided by the live stock contract; the federal Interstate Commerce Act providing that no such notice shall be required in such case as a condition precedent to recovery. —Talbott v. Payne, Director General of Railroads, W. Va., 111 S. E. 328.

16. **Carriers of Passengers**—Assault by Employee.—A street car company is the perpetrator and is responsible for an unauthorized and willful, aggravated assault on a passenger by its employee.—Eastern Texas Electric Co. v. Baker, Tex., 238 S. W. 335.

17.——Degree of Care.—Where a boy of 12, a passenger on a street car, rested his left arm on the window sill with some part of the arm protruding outside the window, and was injured by a passing truck, it cannot be said as a matter of law that he should have apprehended the possibility of danger from the truck driven in violation of traffic regulations.—Kutchai v. Moreton, Mich., 187 N. W. 339.

18.——Loss of Baggage.—Where an interstate passenger, after reaching her destination, decided because of the failure of a friend to meet her to go to another place within the state, and rechecked her trunk without physical delivery, such journey was intrastate, and not controlled by the interstate limitation of liability as to loss of baggage.—Herndon v. Southern Ry. Co., S. C., 111 S. E. 13.

19.——Transferring. — A person who has alighted from a street car for the purpose of transferring to another car and has reached a place of safety on the highway or the sidewalk, so that the street car company has no control over her movements or over provisions for her safety, is not a passenger to whom the street car company owes the high degree of care of a carrier to its passenger, but is entitled only to the same degree of care from the street car company as any other pedestrian upon the highway.—Virginia Ry. & Power Co. v. Dressler, Va., 111 S. E. 243.

20. **Commerce**—Interstate Commerce.—Where three cars loaded with coal had been brought in by a railroad from another state and placed on a siding for the consignee, who had unloaded two of the cars, the shifting of the three cars by the carrier so as to remove the two unloaded cars to another siding until orders were received to return them to the mine, and to place the loaded car in position for unloading, was not a movement in interstate commerce, so that there can be no recovery for the death of an employee resulting from the violation of the federal Safety Appliance Act requiring automatic couplers.—Camp v. Pennsylvania R. Co., N. Y., 193 N. Y. S. 31.

21. **Contracts** — Building Code. — Parties to building contract were bound by provision of Building Code made a part of the contract, though such provision of the Code was afterwards held unconstitutional.—Becker v. Lincoln Building Co., Mich., 187 N. W. 382.

22.——Installments.—Contract by a manufacturer to take a specified quantity of goods at a stated price, in monthly installments as required by his business, but in any event the entire quantity to be taken within a reasonable time, especially where, under a similar contract, the buyer had for three years been receiving from the seller all like goods used by him, and the parties had maintained business relations for five years before that, is not void as indefinite, or unenforceable as unilateral.—E. Richard Meinig Co. v. United States F. Co., N. Y., 193 N. Y. S. 106.

23.——Meetings of Minds.—Defendant made no reply to plaintiff's acknowledgment of the acceptance of the first offer and the notice that another car had been ordered. Held that, because the plaintiff's second communication introduced new terms and conditions, the minds of the parties never met upon a contract.—Southwestern Coal Co .v. Calbeck, Kan., 205 Pac. 361.

24. **Corporations**—Implied Promise. — Where the law implies a promise on the part of a consolidated corporation to pay the liabilities of the constituent companies, the situation is precisely the same in principle as if such promise were an express promise, and creditors of the constituent companies may recover on it by action at law against the promisor.—American Ry. Express Co. v. Downing, Va., 111 S. E. 265.

25.——"Foreign Commerce."—Where plaintiff, a resident of Ontario, doing business as the Hamilton Bottle Exchange, ordered a carload of bottles to be shipped to him from Michigan, with a draft attached to the bill of lading, payable before the delivery of the shipment, the transaction was in foreign commerce, under Const. U. S. art. 1, § 8, cl. 3, and hence in an action by plaintiff for breach of contract it was error to enter judgment against him under Comp. Laws 1915, § 14568, for plaintiff's failure to file a certificate showing the real names of the persons conducting business under the name assumed, as required by section 6349.—Levin v. Fisher, Mich., 187 N. W. 328.

26.——Mistake of Fact.—The fact that all parties to a sale of all the stock of a corporation to one stockholder overlooked the liability of the corporation to the federal government for income and excess profit taxes, and did not consider the lien for such taxes against the property of the corporation in determining the value of the corporate stock, was not a mistake as to any fact or as to the application of the law to any fact, and does not entitle the purchasing stockholder to any relief in equity after he was compelled to pay the taxes.—Quinn v. McLendon, Ark., 238 S. W. 32.

27.——Similar Name.—A corporation which adopts a name similar to another, but not of itself calculated to deceive, may nevertheless be enjoined from using it if it be shown that its officers and agents, by false representations and deceptive practices, are causing people to deal with it in the belief that they are dealing with such other concern.—Grand Lodge A. F. & A. M. v. Grand Lodge A. F. & A. M., W. Va., 111 S. E. 309.

28.——Stock Subscriptions.—False statements by an authorized agent of a corporation in pro-

curing a subscription for capital stock that all the stock theretofore issued and that which would be issued in the future would be paid for at par by money or services, as required by Civ. Code 1912, § 2799, and that the corporation was at that time engaged in manufacturing its product, are material misrepresentations of facts which entitle the subscriber to rescind his subscription.—Steele v. Singletary, S. C., 110 S. E. 833.

29. **Covenants** — Restrictions. — A restriction on land, permitting erection of buildings for mercantile purposes, permitted the building of a gasoline and oil service station for automobiles.—Goodlove v. Hamburger, Mich., 187 N. W. 398.

30. **Employers' Liability Act**—Interstate Commerce.—One engaged in repairing the track of an interstate railroad when injured by a fall while pushing a motorcar held engaged in work, so closely connected with "interstate commerce" as to entitle him to the benefit of the federal Employer's Liability Act.—McLean v. Boston & M. R. R., N. H., 116 Atl. 435.

31.——Interstate Commerce.—A railroad employee who was repairing a telegraph line and poles used by an interstate railroad engaged in interstate commerce within federal Employers' Liability Act.—Yarde v. Hines, Mo., 238 S. W. 151.

32. **Fixtures** — Drilling Rig. — Drilling rig, placed upon land by drilling contractor under contract with owner of placer mining claim after location notice was posted, as required by Cv. Code, § 1426d, held personalty and not fixtures as between contractor and owner of land who made homestead entry thereon, under Act Cong. July 17, 1914, reserving to the United States deposits of oil or gas, with the right to prospect for, mine, and remove such deposits, regardless of whether the mining claim was valid under Act Cong. June 25, 1910, § 2, as against the government or a subsequent mining claimant.—Midland Oil Fields Co. v. Rudneck, Cal., 204 Pac. 1074.

33. **Highways**—Maintenance.—County's duty to "maintain" public road under Laws 1917, p. 469, § 4, held to require it to cure defects in the original construction.—McClung v. King County, Wash., 204 Pac. 1064.

34. **Husband and Wife** — Separate Estate. — Wife acquiescing in husband's use of income from separate estate assumed to have consented and not entitled to accounting.—Williams v. Williams, Tenn., 236 S. W. 926.

35. **Injunction** — Former Employe. — Where the contract of employment of a laundry wagon driver was not under Pub. Acts 1917, No. 171, a driver who had been working on a specified route for a laundry company will not be restrained from working for a competitive employer, when not using lists and property of the first employer.—Federal Laundry Co. v. Zimmerman, Mich., 187 N. W. 335.

36. **Intoxicating Liquors**—Common Nuisance. —In a suit under Volstead Act, tit. 2, §§ 21, 22, 24, to abate a liquor nuisance, it is not necessary in all cases to prove repeated sales, in order to justify a finding of a common nuisance.—Lewinsohn v. United States, U. S. C. C. A., 278 Fed. 421.

37.——Manufacture.—"Under the prohibition law, declaring it a felony to 'distill, manufacture, or make any liquors or beverages, any part of which is alcoholic,' the act of making an intoxicating beer, through the fermentation of syrup, corn meal, and water mixed for that purpose, is of itself an offense as complete and distinct as the further act of distilling from such beer a quantity of alcohol, whisky, or rum."—Coulter v. State (No. 13178), Ga., 111 S. E. 214.

38.——Payment by Note.—Notes given for the purchase price of cider violating the Volstead Act, because containing more than one-half of 1 per cent alcohol, were void.—Balaguer v. Macey, Tex., 238 S. W. 322.

39. **Landlord and Tenant**—Waste.—Purchaser could not maintain an action against tenant for waste committed before the purchase of the premises in the absence of an assignment of the cause of action therefor, not having had title to the property at the time of the commission of the waste.—J. B. Hill v. Pinque, Cal., 204 Pac. 1097.

40. **Liens** — "Equitable Lien." — Whenever parties enter into an express executory written agreement indicating an intention to make some particular property or fund security for a debt or other obligation, there is created an equitable lien on such property, enforceable in the hands of the original contractor and his heirs, administrators, executors, voluntary assignees, purchasers, and incumbrancers with notice.—Aldrich v. R. J. Eberer Co., Ill., 134 N. E. 726.

41. **Master and Servant**—Fellow Servant.—The plaintiff and other employees, who were throwing lead out of the upper windows, and the foreman, who instructed them to do so, were each and all in the same service. Under the rulings of the Supreme Court in Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 S. E. 839, 10 L. R. A. (N. S.) 772, and Brush Electric Light Co. v. Wells, 110 Ga. 192, 35 S. E. 365, the foreman was only a fellow servant. Besides, the order of the foreman to the employees was not the proximate cause of plaintiff's injury, but the negligent manner in which the order was executed by these employees.—Bowden v. Virginia-Carolina Chemical Co., Ga., 111 S. E. 210.

42.——Inexperienced Employee.—The test to determine whether an inexperienced employee was guilty of contributory negligence in attempting to remove a lapfeeder of a card before the lickerin had stopped running is not to inquire whether he could have ascertained whether the lickerin was running before he attempted to remove the lapfeeder, but whether the ordinary man would have attempted to remove when and as he did.—Roussel v. Nashua Mfg. Co., N. H., 116 Atl. 441.

43.——Scaffolds.—Within Rev. St. 1919, § 6802, governing scaffolds used in the erection or taking down of a building, the word "building," which is an edifice, designed to stand more or less permanently and covering a space of land, for use as a dwelling, storehouse, factory, shelter for beasts, or some other useful purpose, includes a model repair shop consisting only of a wooden framework not inclosed, intended for the demonstration of repair machinery.—Bennett v. G. T. O'Maley Tractor Co., Mo., 238 S. W. 744.

44.——Scope of Employment.—If a railway express company employee, who was furnished a pistol with which to guard property intrusted to the company, used it in the discharge of his duties to compel compliance by a co-employee with his direction to return to work, and used excessive force, the company would be liable for the death of such co-employee, resulting from the accidental discharge of the pistol.—American Ry. Express Co. v. Davis, Ark., 238 S. W. 50.

45. **Municipal Corporations**—Obstruction of Streets.—The streets of a city are common highways for the use of the public in passing and repassing, and any one who obstructs such streets by collecting thereon an assemblage to deliver an address to them without first having obtained permission from the public authorities in charge of such highways commits a public nuisance.—Harwood v. Trembley, N. J., 116 Atl. 427.

46.——Street Improvement.—Where, in the assessment of a street improvement, a stipulation was entered into providing that on other lots, against which confirmation of assessment was sought, were long-term leases owned by lessees, and excepting where such long-term leases were on lands which were not exempt the long-term leases were not separately assessed, but where there were long-term leases on exempt land, that only was assessed which could legally be assessed, there was no discrimination.—City of Chicago v. University of Chicago, Ill., 134 N. E. 723.

47. **Negligence**—"Res Ipsa Loquitur."—Where a traffic officer was struck by a projecting box on a truck which he had signaled to move forward, an instruction requiring a finding of knowledge, or means of knowledge on the part of the driver, and that the driver's conduct constituted negligence as elsewhere defined, or a failure to exercise ordinary care, and that such

negligence was the direct cause of the injury, before bringing in a verdict for plaintiff, held not improper as being insufficient under the humanitarian rule.—Boyle v. Bunting Hardware Co., Mo., 238 S. W. 155.

48.——Res Ipsa Loquitur.—In the absence of an explanation, the bursting of a boiler justly and reasonably warrants an inference of negligence within the doctrine of res ipsa loquitur, which in its distinctive sense permits negligence to be inferred from the physical cause of an accident.—Harris v. Mangum, N. C., 111 S. E. 177.

49. **Railroads**—Crossing.—It is not illegal of itself to drive a motor-truck onto a railroad crossing without stopping, but that fact is one to be considered on the issue of the driver's care.—Speares Co. v. Railroad, N .H., 116 Atl. 343.

50. **Sales**—Acceptance.—Where the parties had exchanged considerable correspondence concerning an order for a large quantity of cloth tape, and as a result thereof defendant finally ordered the shipment of tape by reference to a previous order to be made in weekly shipments, the action of plaintiff in making weekly shipments of substantially the amount ordered was an implied acceptance of the order.—Lang & Bros Mfg. Co. v. Ft. Wayne C. Paper Co., U. S. C. C. A., 278 Fed. 483.

51.——Change of Destination.—Under a contract for the sale and purchase of 100 cars of coal, to be delivered f. o. b. at the mine, "destination where ordered," the destination of the coal was a matter immaterial to the seller, and where it claimed that by reason of a car embargo it was unable to ship to a destination ordered, because off the line of railroad on which its mine was located, the buyer held to have the right to designate another point of destination on such line and not affected by the embargo.—Wicknam & Burton Coal Co. v. Evans Coal Co., U. S. C. C. A., 278 Fed. 506.

52. **Taxation**—Losses on Short Sales.—Where a short sale was made in 1918, and was covered at a loss during the year 1919, only so much of the loss as accrued after January 1, 1919, could be deducted from income for purposes of fixing income tax, under Tax Law, §§ 351, 353, 359, 360; a loss being "sustained" when the price advanced, though not "taken" until stocks were purchased to cover.—People v. Wendell, N. Y., 192 N. Y. S. 143.

53.——Proceeds of Life Insurance.—The proceeds of a life policy, payable to the assured or to his estate, becomes a part of his estate, and the transfer of such proceeds is taxable; but, if the policy is payable to a beneficiary named, its proceeds are not taxable.—in re Voorhees' Estate, N. Y., 192 N. Y. S. 165.

54. **Wills**—"Children."—The words "child," "children," and "issue," when used in a statute, will, or deed, mean legitimate children, and will not be extended by implication to embrace illegitimate children, unless such construction is necessary to carry into effect the manifest purpose of the Legislature, testator, or grantor.—Hardesty v. Mitchell, Ill., 134 N. E. 745.

55.——Life Estate.—Ordinarily a devise to one "and her children" passes but a life estate to the first taker, with remainder in fee to the children as a class.—In re McCullough's Estate, Pa., 116 Atl. 477.

56.——Undue Influence.—A motion for directed verdict in proceedings to contest a will for undue influence on the ground that the residuary bequest to the attorney of testatrix raised the presumption of undue influence was properly denied, where there was evidence that in the preparation of the will testatrix had the benefit of independent legal advice.—In re Browne's Estate, Mich., 187 N. W. 354.

57. **Workmen's Compensation Act**—Contributory—Negligence.—Though the violation of an order of the employer which takes the employee entirely out of the sphere of his employment prevents recovery of compensation for injuries, an employee's violation of an order to use the street car in reaching a depot to which he was sent to mail a letter on a train did not take him out of the sphere of his employment, and his dependents can recover compensation for his death while walking to the depot along the railroad right-of-way.—Republic Iron & Steel Co. v. Industrial Commission, Ill., 134 N. E. 754.

58.——Course of Employment.—Where a cook employed in a hotel kitchen became overheated and fainty, and stepped into the alley to get fresh air, fainted and fell, and his arm was run over by the wheels of a passing truck, from which injury he died, and it was shown that the kitchen was always warm, and it was necessary for employees to step into the alley for air, the fainty condition arose out of employment and a causal connection between the employment and injury appeared justifying recovery under the Workmen's Compensation Act.—Patten Hotel Co. v. Milner, Tenn., 238 S. W. 75.

59.——Course of Employment.—A servant, who fell into a reservoir and was drowned while washing up prepatory to going home according to custom, died as the result of an accident "arising out of and in the course of employment" under the Workmen's Compensation Act.—Tennessee Chemical Co .v. Smith, Tenn., 238 S. W. 97.

60.——Course of Employment.—Accident to employee who fainted and fractured skull as the result of inoculation which he was induced to undergo by employer during influenza epidemic held to have arisen out of and in the course of the employment.—Freedman v. Spicer Mfg. Corporation, N. J., 116 Atl. 427.

61.——Course of Employment.—In proceedings under the Workmen's Compensation Law to recover compensation for the death of a printer caused by blood poisoning from a finger cut, the employer's reports to the Department of Labor, stating that the place of accident was in the employer's job rooms, and that the cause and manner of the accident was a cut on the finger and infection from handling type, held to constitute prima facie evidence that the accident arose out of and in the course of the employment and to furnish legal support for such a finding.—McCartney v. Wood-Temple Co., Mich., 187 N. W. 251.

62.——"Employe."—One who is a partner with a company operating a cotton gin wherein he is accidentally killed is not an employee of the company within the Workmen's Compensation Law.—Millers' Indemnity Underwriters v. Patten, Tex., 238 S. W. 240.

63.——Interstate Commerce.—Where an interstate train was being cut so that another car might be made a part thereof "in station order" so that each car when it reached its destination might readily be detached and the train sooner proceed, and thus interstate as well as the intrastate transportation be better effected, the entire train, so far as liability is concerned, was an interstate train.—McNeill v. Director General of Railroads, Pa., 116 Atl. 476.

64.——"Interstate Commerce."—A laborer in a repair and construction gang, who was fatally injured by a train of his employer when about to engage in the construction of a crossover railroad track, which, when completed, would enable the carrier to engage in interstate commerce, held not engaged in interstate commerce, so as to prevent recovery under Workmen's Compensation Law.—Otterstedt v. Lehigh & H. R. R. Co., N. Y., 193 N. Y. S. 104.

65.——"Willful Misconduct."—Mere negligence, however great, is not "willful misconduct" within the Workmen's Compensation Act (Comp. Laws 1915, § 5432), precluding recovery of compensation, but the employee is guilty of such misconduct where the conduct occasioning the injury is of a quasi criminal nature, involving the intentional doing of something with knowledge that it is dangerous, and with a wanton disregard of consequences; and a coal miner was guilty of such misconduct where he jumped across the pit, instead of walking along path provided therefor, in violation of Comp. Laws 1915, §§ 5542, 5562.—Fortin v. Beaver Coal Co., Mich., 187 N. W. 352.

66.—Written Demand.—In Workmen's Compensation proceeding, employer would have waived employee's failure to file written demand for compensation within required time by failure to raise the question before the Industrial Commission.—Jackson v. Industrial Commission, Ill., 134 N. E. 749.

Index-Digest

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Subject-Index

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Chas. R. Blumenfield.
John G. Conway.
WEST ALLIS.
Nicholas F. Lucas.
WEST SUPERIOR.
W. M. Steele.
WISCONSIN RAPIDS.
Goggins & Brazeau.

WYOMING.

CASPER.
Alfred R. Lowey.
W. H. Patten.
CHEYENNE.
W. C. Kinkead.
Herbert V. Lacey.
Chas. E. Lane.
GREYBULL.
Edw. H. Ellis.
ROCK SPRINGS.
F. W. Johnson.
Lewis H. Brown.
Rush L. De Nise.
SHERIDAN.
C. A. Kutcher.
Diefenderfer & Wakeman.

BRAZIL.

RIO DE JANEIRO.
Richard P. Momsen.

CANADA.

MONTREAL.
Victor E. Mitchell.
HALIFAX.
H. Mellish.

FINLAND.

HELSINGFORS.
C. L. Kagey.

NEW ZEALAND.

WELLINGTON.
F. Harrison.

SCOTLAND.

GLASGOW.
Donald Mackay.